United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

DOCKET No. 74-1033

TO BE ARGUED BY: ANTONIO C. MARTINEZ

B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GUSTAVO ADOLFO MONTES-ROMO and
DORA OCHOA-HUNT DE MONTES,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE

(by its District Director at New York, N.Y.)
Respondent.

PETITIONER'S BRIEF

ANTONIO C. MARTINEZ
Attorney for Petitioner
324 W. 14th Street
New York, N.Y. 10014
Tel.: (212) 989-0404

I N D E X

STATUTES, DECISIONS INVOLVED

IMMIGRATION AND NATIONALITY ACT OF 1952,

Sec. 212(a)(14), 8 U.S.C. Sec. 1182(a)(14)

Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General*****The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residente)*****

Sec. 212(a)(15), 8 U.S.C. Sec. 1182(a)(15)

Aliens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges.

Matter of T---, 3 I.N.S. 707 (1949).

See Exhibit 'A' to this brief.

STATEMENT OF THE ISSUES

A. Whether the sharp conflict between the Board of Immigration Appeals administrative decision in Matter of T--- 3 I & N Dec. 707 (1949) and the decision in the case at bar does not require that the case be remanded for a resolution of the conflict by the Board;

B. Whether the Immigration Judge's refusal to make findings of fact with respect to the exceptional hardship and severe economic detriment which will be suffered by petitioners' United States citizen child if petitioners were forced to depart is not reversible error, Matter of T--- 3 I & N Dec. 707 (1949)

STATEMENT OF THE CASE

Petitioners Gustavo Adolfo Montes-Romo and Dora Ochoa-Hunt de Montes, husband and wife aliens ("the alien") both entered the United States as visitors in 1969 and 1972 respectively. While here, a child was born to them on January 25, 1973, R. 3a. Thus, the aliens became exempt the labor certification requirement of Sec. 212(a)(14) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1182(a)(14) when applying for immigrant visas.

Since they had overstayed the period of their admission, they were served with Orders to Show Cause why they should not be deported, R. 1-a and 2-a. At their deportation hearing the Immigration Judge found the aliens deportable and refused to grant them "extended voluntary departure."

The Immigration Judge reduced to 30 days from 90 days the "voluntary departure" period because the aliens had indicated that they would appeal his decision, R. 6-a and 7-a.

The Immigration Judge also refused to hear and cut short counsel's attempt to develop the issue of the serious economic detriment which would be visited upon the aliens' U.S. citizen child if they were forced to leave immediately. R. 4-a and 5-a.

On appeal, R. 8-a the Board of Immigration Appeals considered two arguments made by counsel for the aliens:

(1) that serious economic detriment will accrue to the U.S. citizen child if the aliens are forced to depart at this time, and

(2) that compelling humanitarian factors exist for the granting of extended voluntary departure.

Both arguments were rejected without any explanation why the Board's previous decision in Matter of T---, 3 I & N 707 (1949), Exhibit 'A' should not be followed

This petition for review was filed in January 1974.

ARGUMENT

POINT 1. The Board of Immigration Appeals has failed to explain why its decision in Matter of T--- is distinguishable.

The Board's full opinion in Matter of T--- is attached hereto as Exhibit 'A'. There the Board has held that an alien mother of a U.S. citizen child should not be deported because of the economic detriment that would be visited upon the 2-year old child.

In the case at bar, the aliens are the parents of a U.S. citizen child who will be 2 years' old in January, 1975. The child is in his formative years. If he continues to live in the United States, his mother tongue will, in all likehood, be English. If he is forced to live abroad, he will be alienated from the country of his birth.

The Immigration Judge refused to permit the aliens' counsel to press the point, R. 3a. On administrative appeal the Board, rather sanguinely held:

> "Understandably economic detriment will result to the United States citizen child if his parents are deporte. Nevertheless, it is one of the incidents of a situation brought abort by the continuance of the (aliens) themselves and it is not due to any act or conduct of the Government." R.9a.

In short, in the Board's view, it matters not that the U.S. citizen child in this case, will suffer economic detriment. It is just this child's hard luck that his case was considered by a Board that took a different view of what constitutes "the proper measure of economic detriment".

This illogical result below requires a remand to Board for a resolution of its two conflicting decisions.

POINT II. Compelling humanitarian factors do exist for granting extended voluntary departure.

The record shows that the Immigration Judge cut short an attempt by the aliens' attorney to develop the issues which the Board has passed upon without the benefit of findings of fact and conclusions of law made at the administrative trial leve. This error of law is highly prejudicial to the aliens' position before this Court.

Briefly, the material facts not appearing from the record and going to the issue of "compelling humanitarian factors" are that soon after the birth of their U.S. citizen child, the aliens did register as intending immigrants with the American Consulate at Guayaquil, Ecuador. They were granted a "priority date" of March 8, 1973.

At the present time, immigrant visas are issued to Western Hemisphere immigrants with August 15, 1972 priority dates. Thus, in the normal course of events, the aliens would receive a visa appointment in July, 1975. In order to qualify for immigrant visas, the aliens must show that they are not "likely" to become a public charges, Sec.212(a)(15) of the Act, 8 U.S.C. Sec. 1182(a)(15).

The aliens' present jobs in the United States are their only assets which show that they are not "likely" to become public charges. If they must relinquish these jobs in order to comply with the deportation orders, they will no longer be in a position to make the requisite showing to the consular officer.

In sum, the deportation orders are more than likely to prejudice the right of the U.S. citizen child to live and grow in the country of his birth, because at the tender age of 2, he is not likely to be abandoned by his parents upon the execution of the warrants or deportation. Nor is he ever likely to come back to the U.S. during his formative years if the aliens are found by the consular officer to be "likely" to become public charges.

C O N C L U S I O N

The Board's decision in respect to the two issues

presented on administrative appeal are not based on findings of fact and conclusions of law at the administrative trial level.

The Board's decision fails to explicate how it is distinguishable from the Board's decision in Matter of T---.

The Board's decision should be set aside and the case remanded for decision at the administrative appellate level based on findings of fact and conclusions of law made at the administrative trial level.

Respectfully submitted,

ANTONIO C. MARTINEZ
Attorney for Petitioners
324 West 14th Street
New York, N.Y. 10014
Tel: (212) 989-0404

Dated: New York, New York
December, 1974

IN THE MATTER OF T——

In DEPORTATION Proceedings

A–6250408

Decided by Central Office, August 19, 1949

Decided by Board, November 25, 1949

Suspension of Deportation—Section 19 of the Immigration Act of 1917, as amended—"Serious economic detriment".

Whether the deportation of the alien mother would result in a serious economic detriment to the minor (about 2 years old) United States born child, living here with the mother and the legally resident alien father, within the meaning of section 19 (c) of the Immigration Act of 1917, as amended, is a question determined from all the relevant factors and circumstances involved, and the child's need of an unbroken home with joint parental care may be a consideration (among others) in reaching such a determination.

CHARGE:

Warrant: Act of 1924—Remained longer, visitor.

BEFORE THE CENTRAL OFFICE

Discussion as to deportability: The record relates to a 36-year-old married female, a native and citizen of Greece, who entered the United States at Baltimore, Md., on February 20, 1946, as a visitor for 6 months. That entry has been verified. The alien admits that this was her only entry into this country and that at the time of such entry it was her intention to return to Greece at the expiration of 6 months. She further testified that she was granted extensions of stay to July 1947, and has resided continuously in the United States since her entry on February 20, 1946. On March 3, 1946, she was married, after which she decided to remain permanently in the United States. She has never been admitted to the United States for permanent residence. The alien is, therefore, deportable under the Immigration Act of 1924.

Discussion as to eligibility for suspension of deportation: The record shows that the alien was legally married to T—— P. T—— on March 3, 1946. She was previously married and submitted a certificate showing the death of her first husband on May 26, 1939. Respondent and her husband have one child born on August 23, 1947, at New York, N. Y. She testified that she had assets of $100,000 in

EXHIBIT A

cash and securities and that her son is dependent upon her and her husband for support. Her husband came to the United States as a diplomat in 1924 and has applied for suspension of deportation based upon his long residence in the United States. The respondent's husband is a general partner in the firm of Delafield & Delafield, stock brokers in which firm he has contributed to the capital in the sum of $15,000 in cash and has present drawing averaging $2,000 per month. It is apparent that the alien's deportation would not result in any serious economic detriment to her minor native-born child.

Recommendation: It is recommended that the application for suspension of deportation be denied.

It is further recommended, That an order of deportation not be entered at this time but that the alien be required to depart from the United States, without expense to the Government, to any country of her choice within 90 days after notification of decision, conditioned upon arrangements being made with the local immigration office for verification of departure.

So ordered.

BEFORE THE BOARD

Discussion as to deportability: This matter is before us on appeal from a decision of the Assistant Commissioner of Immigration and Naturalization dated August 19, 1949, wherein the subject of this proceeding was found deportable because she remained longer than permitted under the provisions of the act approved May 26, 1924 and the regulations made thereunder (8 U. S. C., Secs. 214 and 215).

The evidence of record shows that the appellant was born in Greece on January 29, 1913, and that she is a citizen of the country of her nativity. This individual arrived at Baltimore, Md., on February 20, 1946, on S. S. *Amerikí*, and following her arrival, she was admitted to this country as a nonimmigrant visitor for a period of 6 months under the provisions of section 3, sub. 2 of the Immigration Act of 1924 (8 U. S. C. sec. 203). About a month subsequent to her arrival, she married one T—— P. T—— who, according to his statement, came to this country during the year of 1924 as a diplomat, and thereafter remained.

The alien applied for an extension of her temporary admission, and such extension was granted to July 1947. A further application for an additional extension of temporary admission was denied on July 1, 1947, but notwithstanding such denial, the alien remained in the United States.

A male child was born of this union on August 23, 1947.

The husband applied for suspension of deportation, and on August 19, 1949, his application therefor was granted.

Discussion as to eligibility for suspension of deportation: The evidence of record reveals that the subject of this proceeding was married to T—— P. T—— on March 3, 1946. A prior marriage of the appellant was dissolved by the death of her prior spouse. Suspension of deportation is sought by reason of alleged serious economic detriment to the male child born in New York on August 23, 1947.

The Assistant Commissioner of Immigration and Naturalization in his decision of August 19, 1949, points out the circumstances under which the alien's husband came to the United States in 1924, and his subsequent long residence, and that the said husband is a general partner in the firm of Delafield & Delafield, stockbrokers in New York City, in which firm he has capital investment of $15,000, and a monthly drawing averaging $2,000. The alien has assets of some $100,000, and by reason of the financial worth of these persons, an application of suspension of deportation was denied in that—

"It is apparent that the alien's deportation would not result in a serious economic detriment to her minor native-born child."

The Assistant Commissioner of Immigration and Naturalization granted the alien permission to depart from the United States, without expense to the Government, to any country of her choice, within 90 days after notification of decision. However, by reason of the preemption of the quota for Greece, the enforced departure of the alien would in all probability result in a long absence abroad.

Counsel in brief filed in connection with the present appeal asserts that the decision of the Assistant Commissioner of Immigration and Naturalization is obviously shocking and inhumane, and wholly contrary to law, and that the conclusion that the alien's deportation would not result in a serious economic detriment to her minor child is arbitrary, capricious and opposed to both the letter and the spirit of the statute.

As a basis for this assertion, counsel indicates that as a matter of ordinary common sense, no one could possibly take the position that the loss of a 2-year-old child's mother for an indefinite period would not be a serious detriment to the child, because no amount of nurses, governesses or pediatricians can take the place of this or any child's life of love and care of his mother. On the other hand, if the child were to be taken to Europe, he would be forced to suffer the detriment of being brought up in the foreign land without the love, care, and guidance of his father. Counsel further contends that Mr. T—— would not be in a position to accompany his wife and child to Greece, as he would have no means of support in that country.

It is conceded that Mrs. T—— has cash and securities amounting to $100,000, but counsel points out under the social welfare law of

New York, section 101, that both the father and mother of a minor child are legally responsible for his support, and that a married woman is a joint guardian of her child with her husband, with equal powers, rights and duties in regard to him (New York Domestic Relations Law, sec. 81). The latter section thus eliminates the common law preference for the father as the child's guardian.

Counsel points out other considerations in addition to the foregoing, and more particularly the interpretation which he feels should be placed upon the statute that the term economic as used therein may include all that pertains to the satisfaction of man's needs, and that the child's greatest needs are the love and care of his mother and father in an unbroken home.

This Board has given careful consideration to all the evidence of record, as well as all of the representations of counsel, and to the decision of the Assistant Commissioner of Immigration and Naturalization, and it is our conclusion that to enforce the departure of this appellant from the United States would in our opinion result in a serious economic detriment to this minor United States born child, particularly in the light of the condition of the quota for Greece, as well as the present chaotic condition abroad, particularly in the country of the alien's nativity. Moreover, we feel that the assertions of counsel as hereinabove set forth more nearly accurately establish the serious economic detriment obtaining in this case were the alien to be deported. The evidence establishes that the alien is a person of good moral character.

Suspension of deportation—findings of fact: Upon the basis of all the evidence presented, it is found:

(1) That the alien is not ineligible for naturalization in the United States;

(2) That the alien is a person of good moral character, and has been of such good moral character for the preceding 5 years;

(3) That deportation of the alien would result in serious economic detriment to the minor infant son, a native born citizen of the United States;

(4) That after diligent inquiry, no facts have been developed which would indicate that the alien is subject to deportation under any of the provisions of Section 19 (d) of the Immigration Act of February 5, 1917, as amended.

Suspension of deportation—conclusion of law: Upon the basis of the foregoing findings of fact, it is concluded:

(1) That the alien is eligible for suspension of deportation under the provisions of section 19 (c) (2) of the Immigration Act of February 5, 1917, as amended;

Order: It is ordered that deportation of the alien be suspended under the provisions of section 19 (c), sub. (2) of the Immigration Act of February 5, 1917, as amended.

It is further ordered, That the order entered by the Assistant Commission of Immigration and Naturalization on August 19, 1949, be and the same is hereby withdrawn.

It is further ordered, That if during the session of the Congress at which this case is reported, or prior to the close of the session of the Congress next following the session at which this case is reported, the Congress passes a concurrent resolution, stating in substance that it favors the suspension of such deportation, the proceeding be canceled upon the payment of the required fee and that the alien be charged to the quota for Greece.

Editor's note.—*In the Matter of S——*, unreported A-6245223, B. I. A., August 9, 1949, a widow of an American citizen, with her three native-born minor children had been in Greece from 1935 until they all returned in 1946. She had no assets nor income but a roomer by the name of P—— contributes to support this family because he felt morally obligated to do so. The Board said,

"The Central Office recommended deportation first, for the reason that P—— is not legally obligated to support respondent, and she has no other income, and second, because 'it cannot be perceived how deportation of the respondent would result in a serious economic detriment to her citizen children.' This Board has considered the subject of economic detriment to their families resulting from the deportation of alien women in many cases (*Matter of R——*, 4848889, July 7, 1946; *Matter of C—— S——*, 2354295, July 8, 1946; *Matter of R——*, 5585374, Aug. 7, 1946; *Matter of S——*, 4341646, July 31, 1946). We have held in such cases that economic detriment does result to a citizen child, because he is deprived of his mother's care and half the maintenance for the home when his mother must be supported abroad. A minor child needs the care and attention of an older person, and in the absence of its mother, economic detriment results from the expense of paying someone else to operate the home.

"The Assistant Commissioner's opinion found that satisfactory evidence is of record to show that respondent has been a person of good moral character during the preceding 5 years, including the period of her residence abroad, and granted her voluntary departure. It is our opinion that she is entitled to suspension of deportation, because she has been a person of good moral character during the required period, and deportation would result in economic detriment to her three United States citizen children."

(2)

COPY RECEIVED

Paul J. Curran

UNITED STATES ATTORNEY

12/24/74